No. 178

IN THE

Supreme Court of the United States

OCTOBER TERM, 1920

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY, and UNITED STATES FIDELITY & GUARANTY COMPANY ..... Appellants,

v. No. 178

J. F. HASTY & SONS, MT. OLIVE STAVE CO., PULASKI COOPERAGE COMPANY, and THE HENRY WRAPE COMPANY ..... Appellees.

BRIEF FOR APPELLANTS.

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COMPLAINANTS' EVIDENCE

APPELLEES' EVIDENCE

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STATEMENT.

The references made herein to the transcript are to the pages of the print.

On June the 15th, 1908, the Railroad Commission of the State of Arkansas promulgated standard freight distance tariff No. 3, prescribing

maximum rates on all classes and commodities of intrastate freight on all railroads operated in the state.

On July the 18th, 1908, the St. Louis, Iron Mountain & Southern Railway Company brought suit in the Circuit Court of the United States for the Western Division of the Eastern District of Arkansas, to enjoin said rates on the ground that they were confiscatory. (Tr. page 6.) A temporary injunction was granted on September the 3rd, 1908, and an injunction bond in the sum of Two Hundred Thousand ($200,000) Dollars was filed with the United States Fidelity & Guaranty Company as surety. (Tr. page 7).

A further bond in the sum of Five Hundred Thousand ($500,000) Dollars on the part of the St. Louis, Iron Mountain & Southern Railway Company, without sureties, was filed under orders of June 23rd, 1909. On May the 11th, 1911, a final decree was rendered in the case, sustaining the allegations of the bill and perpetually enjoining the enforcement of the Commission's rates. (Tr. page 8.) An appeal was taken from this decree to the Supreme Court, where the decree of the Circuit Court was revrsed on June the 16th,

1913. (See Allen v. St. L., I. M. & S. Ry Co. 230 U. S. 553.) (Tr. page 9).

Mandate from the Supreme Court was filed in the District Court on July the 18th, 1913, and on the same day a decree was entered, in obedience to the mandate, dismissing the complaint without prejudice, and appointing a special master to state an account of damages sustained by the granting of the temporary and permanent injunctions. The decree directed the master to report separately all claims which arose under the first temporary injunction granted by Circuit Judge Van Deventer (covering the period between the 3rd day of Septmber, 1908, and July the 5th, 1909), all claims that arose under the bonds executed in pursuance to the order made by the District Judge (covering the period from September 5th, 1909, to May the 11th, 1911), and all that arose after the rendition of the final decree on May the 11th, 1911. (Tr. page 10).

On the second day of December, 1914, the Special Master filed his report in the case, showing the claims filed, those allowed and those disallowed, separated into the three periods directed by the decree and designated the periods as "A," "B," and "C." "A" and "B" apply to all claims

that accrued prior to the entering of the final decree, and those in series "C" to all that accrued after the final decree was entered.

It is unnecessary to distinguish between Series "A" and "B" as those claims accrued while the temporary injunctions and injunction bonds were in force, but they are distinguishable from Series "C" in that the latter accrued subsequent to the final decree and after the injunction bonds had ceased to be effective.

The claims of the appellees herein were allowed by the Special Master in the amounts hereinafter specifically set out. The allowances were based on the difference between the rates collected while the injunction was in force and rates alleged to have been provided in item 79 of the Commission's tariff. A number of exceptions were filed, within the proper time, to the master's report and upon the hearing of said exceptions in the District Court the claims of J. F. Hasty & Sons were disallowed on the grounds that the claims were based on interstate shipments and that the rates on which said claims were based were discriminatory. (Tr. page 2.) This ruling was controlling as to all claims herein involved.

Other exceptions were filed to the claims by the appellant herein, but the District Court declined to consider or pass upon said exceptions or make any findings as to them, since the sustaining of the two exceptions above mentioned disposed of the claims. (Tr. page 2).

An appeal was taken from the decree by J. F. Hasty & Sons to the Supreme Court and the decree was reversed on March the 3rd, 1919. (See J. F. Hasty & Sons v. St. L., I. M. & S. Ry. Co. et al. 249 U. S. 134.) (Tr. page 3.) Mandate from the Supreme Court was filed in the District Court on May 3rd, 1919.

On June the 3rd, 1919, the claims herein involved were heard by the District Court upon the exception which had been filed to the findings and report of the master in allowing each and all of said claims, said exception reading as follows: (Tr. p. 11).

"That said claims and each of them are based on in-bound shipments of rough heading, the rates charged thereon being the rates provided by the complainant's tariff—issued during the pendency of the injunction, which tariffs carried rough material rates on rough heading. The basis of

these claims is the difference between the rate actually paid and the rates carried in Item 79 of Standard Freight Distance Tariff No. 3 on bolts. There is no rate on in-bound rough heading provided by Distance Tariff No. 3, Item 79, but the same is covered by Item 41 of said Distance Tariff No 3; and since the rates provided by Item 41 are higher than the rates actually charged, the complainant avers that there is no basis for refund and the Master erred in allowing said claims and each of them."

The exception as to each claim was overruled by the District Court and judgment rendered in favor of the claimants against the complainants, St. Louis, Iron Mountain & Southern Ry. Co., and the United States Fidelity & Guaranty Company on the claims in Series "A" and "B" and judgment against the complainant, the St. Louis, Iron Mountain & Southern Railway Company, on the respective claims in Series "C." (Tr. page 4.) The amounts of the allowances were as follows:

J. F. Hasty & Sons

Series A	$ 1,874.21
Series B	9,122.73
Series C	13,147.95

Mt. Olive Stave Company

Series A	$ 238.40
Series B	1,229.98
Series C	3,305.45

Henry Wrape Company

Series A	$ 115.15
Series B	2,439.76
Series C	4,922.60

Pulaski Cooperage Company

Series A	None
Series B	$ 129.51
Series C	1,106.14

The claims tabulated above were based on alleged overcharges on heading and also on rough material other than heading, and represent the total of each intervener's claims for overcharges on headings and rough material other than headings.

The amount of each of said intervener's claims, which complainant contends are based on alleged overcharges on shipments of headings, is as follows: (Tr. page 19).

J. F. Hasty & Sons

Series A	$ 1,153.36

Series B	4,907.02
Series C	9,175.45
	$15,235.83

Mount Olive Stave Company

Series A	None
Series B	None
Series C	$13,348.72

Pulaski Cooperage Company

Series A	None
Series B	$ 353.06
Series C	778.97
	$ 1,132.03

The Henry Wrape Company

Series A	None
Series B	$ 48.01
Series C	232.55
	$ 280.56

The question involved in this appeal, being whether Item 79 of Distance Tariff No. 3, provided or contained a rough material rate on headings, and, the question being identical as to the claims of all the interveners, the court at the hear-

ing of said causes, by consent of the parties, ordered that all of the claims be consolidated for trial on any appeal that might be taken, and it was stipulated by counsel that only one transcript might be made by the Clerk in all the cases. (Tr. page 19).

Standard Distance Tariff No. 3, under Item 40, prescribes the local or flat rates on lumber, stave bolts, and various other articles enumerated in the tariff, but headings are not carried in this Item and therefore the lumber rate is not applicable thereon. (Tr. page 11-15).

Item 41 of Distance Tariff No. 3 provides the local or flat rates on staves, headings and hoops. (Tr. page 13-16).

The rates prescribed in said Items 40 and 41 are commonly termed local or flat rates and were applicable on the items therein enumerated under the Commission's Tariff No. 3, where there was no re-shipment of the finished product.

Item 79 of Distance Tariff No. 3 prescribed rough material rates on the products therein enumerated, which rates were conditioned upon the manufactured product being re-shipped over the same line bringing in the rough material, and

were only applicable when the shipper re-shipped the requisite proportions in finished product. (Tr. page 17).

Item 79 is quoted at pages 17 and 18 of the transcript, and that portion which prescribes the commodities on which the rough material rates provided for therein are applicable is as follows:

"Rough material rates applicable on rough lumber, staves, flitches, bolts and logs."

While the injunction was in force in this case tariffs were promulgated and were in effect. The tariff put into force March the 12th, 1910, provided a specific rate on rouch heading. (Tr. page 20.) From that time on tariffs were in effect carrying rough material rates on heading. (Tr. page 24).

The rates paid by the appellees on the shipments herein involved were rough material rates prescribed by the rough material tariffs in effect during the pendency of the injunction.

The appellants, St. Louis, Iron Mountain & Southern Railway Company and United States Fidelity & Guaranty Company filed their prayers for appeal and assignments of errors. (Tr. page 32 and 33.) The following errors were assigned:

1. The Court erred in overruling plaintiff's exception to the report of the Special Master, J. G. Wallace, numbered 12, and in finding and holding that "headings" were included in the rates on rough material described in Distance Tariff No. 3 prescribed by the defendants constituting the Railroad Commission of the State of Arkansas, and holding that the rates on rough material prescribed in said tariff applies to that commodity.

2. The Court erred in finding and holding that plaintiff collected from said interveners, J. F. Hasty & Sons, Mount Olive Stave Company, Pulaski Cooperage Company and The Henry Wrape Company, a higher rate for the transportation of "headings" than the rate prescribed on said commodity in Distance Tariff No. 3 promulgated by the Railroad Commission of the State of Arkansas.

3. The District Court erred in rendering judgment against plaintiff, St. Louis, Iron Mountain and Southern Railway Company, and the United States Fidelity and Guaranty Company as surety on the bond of said complainant on account of excessive rates alleged to have been charged and collected by complainant from said

interveners for transportation of "headings" during the time the injunction was in force in said cause.

SPECIFICATION OF ERRORS.

The appellants, the St. Louis, Iron Mountain & Southern Railway Company and the United States Fidelity & Guaranty Company, specify that the court below was in error in overruling the exception of the appellants to the findings and report of the master in allowing each and all of said claims, which exception is as follows: (Tr. page 11).

"That said claims and each of them are based on in-bound shipments of rough heading, the rates charged thereon being the rates provided by the complainant's tariff—issued during the pendency of the injunction, which tariffs carried rough material rates on rough heading. The basis of these claims is the difference between the rate actually paid and the rates carried in Item 79 of Standard Freight Distance Tariff No. 3 on bolts. There is no rate on in-bound rough heading provided by Distance Tariff No. 3, Item 79, but the same is covered by Item 41 of said Distance Tariff

No. 3; and since the rates provided by Item 41 are higher than the rates actually charged, the complainant avers that there is no basis for refund and the Master erred in allowing said claims and each of them," and further specify that:

1. The court erred in overruling plaintiff's exception to the report of the Special Master, J. G. Wallace, numbered 12, and in finding and holding that "headings" were included in the rates on rough material described in Distance Tariff No. 3 prescribed by the defendants constituting the Railroad Commission of the State of Arkansas, and holding that the rates on rough material prescribed in said tariff applies to that commodity.

2. The Court erred in finding and holding that plaintiff collected from said interveners, J. F. Hasty & Sons, Mount Olive Stave Company, Pulaski Cooperage Company and The Henry Wrape Company, a higher rate for the transportation of "headings" than the rate prescribed on said commodity in Distance Tariff No. 3 promulgated by the Railroad Commission of the State of Arkansas.

3. The District Court erred in rendering

judgment against plaintiff, St. Louis, Iron Mountain and Southern Railway Company, and the United States Fidelity and Guaranty Company as surety on the bond of said complainant on account of excessive rates alleged to have been charged and collected by complainant from said interveners for transportation of "headings" during the time the injunction was in force in said cause.

ARGUMENT.

The appellees seek to recover overcharges in freight rates on shipments that moved during the time the Arkansas Railroad Commission's Tariff No. 3 was suspended by the injunction. The basis of their claim is the alleged difference between the rate actually paid by them to the carrier and rates named in Item 79 of the Commission's Distance Tariff No. 3. Item 79 of the tariff prescribes rates applicable on the commodities specifically named therein, where the shipper complied with the conditions of that tariff by re-shipping the requisite amount of finished product. In other words, this item provided for milling in transit rates on commodities therein specified and are commonly termed rough material rates. They

are much lower than the local or flat rates and are only applicable on commodities therein specifically named.

Nowhere in Item 79 is there a specific rate on headings, and in the absence of such specific rate in that item, we are required to look elsewhere in tariff No. 3 for the rate on that commodity. Therefore, we must look to Item 41 of the same tariff, which provides a specific rate on headings, and since the rates provided in Item 41 are higher than the rates actually paid by the appellees herein on the shipments involved, they have no basis for refund.

In compiling tariff No. 3, the Arkansas Railroad Commission had in mind the commodity, "headings," and provided in Item 41 a rate on that commodity, and that is the only rate in the tariff applicable to these shipments. When the Commission came to prepare its rough material schedule, being Item 79, it named the precise commodities on which it intended to grant rough material rates but did not name headings. Therefore, there is no more reason for saying that headings should be construed into the rough material tariff than there is for saying that some commodity spe-

cifically named therein should be construed out of that tariff. If the shippers thought that they should be permitted to ship headings at the low rough material rate, then their remedy was to apply to the Commission and ask that that commodity be included in the rough material tariff.

E. H. Calef, general freight agent of the Railroad Company, was called as a witness in the case and testified that Item 79 did not provide a rate on headings. (Tr. page 20.) He had had thirty-one years' experience in the railroad business and more than twenty years of that time had been devoted to the departmnt where he was required to familiarize himself with tariffs and rates. He was asked to examine the tariffs and explain whether there was a rate carried in Tariff No.3 on headings, and he stated that Item 41 carried a rate on that commodity and further stated that that was the only rate quoted on headings in Distance Tariff No. 3. (Tr. page 21).

The rough material rates are special rates made in special instances on particular commodities and are very much lower than the regular rate. Therefore, if it were left to the opinion of the individual Station Agent whether he should by

construction or analogy include commodities therein where they are not specifically named, it would lead to interminable confusion and discrimination.

There is no force to the contention that the rates in Item 40 of Tariff No. 3 should be applied to headings. That Item covers lumber and names specifically the commodities to which it applies. The witness points out that the lumber rates could not possibly apply to headings.

There is no force in the suggestion that headings should have been included in the rough material tariff. It is not a question of what should or might have been included under the rough material schedule, but the question is, what was in fact included in that schedule. The witness above mentioned points out in his testimony that the shipments of heading up to the time that Tariff No. 3 was compiled had been small as compared to the other rough material handled in the State of Arkansas. As the shipments of heading subsequently increased, the question came before the Commission from time to time and was later included in the rough material rates. (Tr. page 22).

It is suggested in the examination of the witness by appellees Counsel that there may have been instances in which headings moved on rough material rates, but, as pointed out by Mr. Calef, if headings did in fact move on the rough material rates, it was a misapplication of the tariff. (Tr. page 23).

Certainly the erroneous application of the tariff cannot be held to extend the tariff to commodities not covered, the effect of which would be to create rates on any commodity of a similar character to those named in the tariff, if the clerk applying the rate should see fit to do so.

Mr. Davidson and Mr. Rhodes, travelling auditors for the railroad company, who were devoting their special attention to the rough material question and who had had much experience in the matter of rough material rates, testified (Tr. pages 24-25) that there was no rough material rate included in Distance Tariff No. 3 on rough heading, and further testified that the only rate on headings in that tariff was the rate provided in Item 41. It is shown by the testimony that subsequent to the injunction, tariffs were put into effect, in March, 1910 which carried rough material rates

on headings, but in determining whether the appellees in this case shall be permitted to recover, we must look to the provisions of No. 3, for that is the tariff that was enjoined, and to that tariff they must look for their rate authority.

Beginning with March, 1910, the tariffs carried rough material rates on headings. (Tr. page 21.) These tariffs were in effect during the pendency of the injunction and the rates therein prescribed were applied on the shipments of headings made subsequent to March 1910. The fact that the Commission in March, 1910, included headings in the rough material schedule in conclusive evidence that, in the opinion of the commission, it was not covered by Item 79 of the old tariff.

Mr. R. M. Warner, who was chief clerk to the Special Master in this case, and before which master the identical claims herein involved as well as all other claims in the rate case were filed and audited, testified that he had had long experience in the rate business and that Tariff No. 3 did not provide a rough material rate on headings. In other words, that Item 79 did not include that commodity, and further testified that the only rate

carried in Distance Tariff No. 3 on headings was Item 41. (Tr. 26).

In other words, all of these men, who had devoted years to the preparation of and the construction of tariffs, testified squarely and unequivocally that there was no rough material rate in Distance Tariff No. 3 on headings. Therefore, there being no rough material rate in the Commission's tariff on the commodity involved, the only rate applicable thereon would be Item 41, and the rates in that item being higher than the rates actually charged the shippers, there is no basis for refund.

A. R. Bragg, witness for the appellees, testified (Tr. pages 29 and 30) to the effect that headings should be considered rough material and the fact that they are rough material entitles them to the milling in transit rates prescribed in Item 79. This, of course, is untenable and only serves to illustrate how far the witness was willing to go in an effort to stretch the tariff to cover the commodity "headings." Among other things he said: "I don't say, of course, that this tariff (No. 3) reads specifically heading. In looking for a rate on a commodity I look to the tariff for the rate.

* * * * * I am not in the habit of quoting rough material rates."

H. J. Wrape testified for the appellees and admits that his company filed no claims on sawed heading but only on bolts. (Tr. page 31.) His company evidently reached the conclusion that they were entitled to no refund on headings, and, therefore, filed no claims.

J. F. Kennard testified for the appellees, but his evidence throws no light on the situation. He did not become connected with the rough material business until July, 1908, which was just a short time before the injunction was granted in this litigation. The first shipments of heading received by his company were received in June, 1910. (Tr. page 31.) At that time the tariffs carried specific rates on heading.

The Arkansas Railroad Commission was the tribunal authorized to fix rates to be charged by railroads in the State of Arkansas, and in pursuance to that authority promulgated Standard Distance Tariff No. 3. (Tr. page 6).

From an examination of the statutes hereinafter referred to it is seen that the Arkansas Railroad Commission is the only tribunal in the state

with authority to make railroad rates. In this respect its power is even greater than the authority conferred upon the Interstate Commerce Commission, for no rate can be initiated in the State of Arkansas except by the Railroad Commission, and when any change is to be effected the change must be made by the Commission itself, after proper notice and hearing in accordance with the statutes.

The Arkansas Legislature in 1899 created the Railroad Commission of Arkansas, Section 6788 of Kirby's Digest, the pertinent part of which section reads as follows:

"A Railroad Commission is hereby created, to be composed of three members to be appointed by the Governor, until the next general election, by and with the advice and consent of the General Assembly in joint session."

The section immediately following the one above quoted prescribed the qualifications of the individual Commissioners, salaries to be drawn, the method of employing rate experts, etc.

Section 6802, Kirby's Digest, provides among other things:

"Said commission will make reasonable and just freight, express and passenger tariffs to be observed by all persons and corporations operating any railroad or engaged in transporting persons or property as express or freight in this state; * * * * * And said commission, in making such rules and regulations, shall first give the person or corporation to be effected thereby notice to appear and show cause, if any it can, why no change should be made in the rates then in force. * * * * * And when any tariff of charges is corrected and approved, said commission shall append a certificate of its approval to said tariff of charges and give notice thereof to any officer or agent of the railroad or express company to be affected thereby, and said ariff and charges shall be kept posted up for at least five days before the same shall go into effect. * * * * * Said commission shall not alter or change any tariff or charges so approved by it except upon ten days' notice in writing to the person or corporation operating the express company or railroad to be effected by such change, giving the same an opportunity to be heard. * * * *

Section 6803, Kirby's Digest, requires the railroad company to keep posted up at every depot its tariff or rate schedules so prescribed by the

commission, which shall state: "First, the different kinds and classes of property to be carried. * * * * * * Third, the rate of freight or express charges for carriage between such places. * * * * * * * * *

The statute goes on to require the railroads to transport and deliver freight at the rates prescribed.

Section 6804 of Kirby's Digest provides:

"It shall be unlawful for any person or corporation engaged alone or associated with others in the transportation of passengers or property by railroad in this state, as freight or express, directly or indirectly, to demand or receive from any person, firm, company or corporation any greater or less rate or amount of compensation than is demanded or received from any other person, firm, company or corporation for substantially similar and contemporaneous services, or to allow any person, firm, company or corporation, directly or indirectly, any rebate, drawback or other advantage in any form, or to make any preference in furnishing cars or motive power. * * * * * * And shall perform, with equal expedition and at uniform rates, the same kind of services connected

with the contemporaneous transportation thereof as aforesaid."

Subsequent sections provide penalties for violation of the statute.

The case of Texas and Pacific Railway Company v. The American Tie & Timber Company, 234 U. S. 138, and the authorities therein cited lay down the principle for which we are contending. In that case there was an attempt by the shipper to have railroad cross ties moved on lumber rates, although the tariff did not specifically name cross ties. In that case there was conflict in the testimony as to whether the tariff should be construed to cover cross ties, and the court held, in view of such uncertainty and conflict, the only remedy of the shipper was to apply to the Commission to have a rate on cross ties eo nomine. In the present case the only remedy for the shipper was to have applied to the Arkansas Railroad Commission for rate on headings eo nomine. This application was made in 1910, and granted, and thereafter headings were transported on the rough material rates.

W. C. Hasty, a witness for the appellees, testified that there had been, for a long time, rough

material rates in effect in Arkansas, and that headings had been moved on a rough material rate, but the witness fails to quote tariffs or be specific in his reference to his rate authority. He refers to tariffs in effect prior to Distance Tariff No. 3 and states that those tariffs carried rough material rates, but the witness fails to show wherein Tariff No. 3 carried a rough material rate on headings. (Tr. pages 27-28). The most that can be made of his testimony is that he exhibited a few expense bills to his deposition, showing that prior to the promulgation of Distance Tariff No. 3 headings had been moved on a rough material rate. Nothing of advantage can be gained in this for the obvious reason that even if headings had moved under the rough material tariff such would not be sufficient to create or establish a rate on that commodity.

In deciding this precise point the court, in the case of Texas & Pacific Railway Company v. The American Tie & Timber Company, 234 U. S. 138 said: "If, as we have seen, the question of whether cross ties were embraced in the filed tariff concerning lumber was involved in such conflict and doubt as to require the action of the Inter-

state Commerce Commission, the situation was such that the Railway Company could not do by indirection that which the statute permitted it to do only by compliance with the law; that is, filing its tariffs in the regular way."

In Mitchell Coal & Coke Company v. Pennsylvania Railroad Company, 230 U. S. 247, the court said on page 255:

"The courts have not been given jurisdiction to fix rates or practices in direct proceedings, nor can they do so collaterally during the progress of a lawsuit when the action is based on the claim that unreasonable allowances have been paid. If the decision of such questions was committed to different courts with different juries the results would not only vary in degree, but might often be opposite in character—to the destruction of the uniformity in rate and practice which was the cardinal object of the statute."

The principle announced in the case of Texas & Pacific Railroad Company v. American Tie & Timber Company, supra, was approved in Loomis v. Lehigh Valley Railroad Company, 240 U. S. 43, 36 Supreme Court Reporter 228.

A consideration of the decisions demonstrate the impracticability of submitting to the courts the question of the construction of ambigious tariffs, for the result in the different cases would doubtless vary as widely as did the testimony of the witnesses in this case.

Respectfully submitted,

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